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In The

Supreme Court of the United States

OCTOBER TERM, 1952

No. 391, MISC.

LAFAYETTE MILLER,
PETITIONER,

vs.

STATE OF NORTH CAROLINA,
RESPONDENT.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI.

HARRY McMULLAN,
Attorney General,

RALPH MOODY,
Assistant Attorney General,

COUNSEL FOR THE STATE OF
NORTH CAROLINA, RESPONDENT.

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In The

Supreme Court of the United States

October Term, 1952

No. 391, Misc.

LAFAYETTE MILLER,
Petitioner,

vs.

STATE OF NORTH CAROLINA,
Respondent.

Brief of the State of North Carolina, Respondent, Opposing Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner, Lafayette Miller, is asking this Court to review a decision of the Supreme Court of North Carolina holding that the Petitioner was properly tried and that the judgment against him, as issued by the Superior Court of Beaufort County, is valid and proper. The Petitioner was convicted of the capital offense of murder in the first degree, and the opinion of the Supreme Court of North Carolina filed January 30, 1953, is reported as LAFAYETTE MILLER

v. STATE OF NORTH CAROLINA, 237 N. C. 29, S.E. (2d) Adv. Op. No. , March , 1952. (See Appendix, p. 16, where opinion of Supreme Court of North Carolina is set out in full.)

Petitioner instituted this proceeding under the North Carolina Post-Conviction statute(Chapter 1083, Session Laws of 1951—G.S. 15-217, Cumulative Supplement of 1951). The statute is set forth in the Appendix at p. . Counsel for Petitioner appearing in this proceeding are not the same counsel which appeared for the Petitioner in his trial in Beaufort County. After Petitioner's conviction of murder in the first degree and after the events which have been stated in the facts of this case, Petitioner was confined in the Central Prison at Raleigh for execution according to law, and on April 24, 1952, counsel for Petitioner filed a petition in the Superior Court of Wake County (R.p. 1) alleging that he had been deprived of his constitutional rights in the selection of the grand and petit juries in Beaufort County because of alleged race discrimination. On the 24th of April, 1952, the Petitioner filed an application directed to Honorable Leo Carr, the judge holding the Superior Court of Wake County (R.p. 5), reciting the petition and asking for an injunction to restrain the Warden of the Central Prison from carrying into execution the sentence heretofore imposed on Petitioner. On the 24th of April, 1952, Judge Carr signed an order restraining the Warden of Central Prison from carrying out the sentence (R.p. 7) and also signed a consent order transferring this proceeding to Beaufort County (R.p. 9), to be disposed of by the Superior Court of that county. On the 2nd day of May, 1952, the Honorable Walter W. Cohoon, Solicitor of the First Judicial District, filed answer in behalf of the State of North Carolina to the petition of Petitioner (R.p. 10), wherein it was alleged by the State that no racial discrimination had been practiced in the selection of the grand and petit jurors concerned in Petitioner's indictment and trial, and it was further alleged (R.p. 21) that the Petitioner had purposely waived any constitutional questions or the right to have any constitutional questions determined

relative to the selection of the grand jurors and petit jurors and that the Petitioner had failed to move to quash the bill of indictment prior to the time of pleading thereto and failed to challenge the array of jurors on the trial panel and had thereby waived any constitutional questions relating to any alleged racial discrimination in jury selection. Thereafter on Tuesday, May 13, 1952, this proceeding was heard by his Honor Clawson L. Williams, Judge of the Superior Court, who was authorized to conduct such hearing, as provided by the post-conviction statute, and as a result of said hearing, the Court made findings of fact (R.p. 18) and concluded that no racial discrimination in the selection of said jurors had been practiced and that no constitutional rights of the Petitioner had been violated in his trial and that the Petitioner, as a matter of law, had waived any right he had to quash the indictment and challenge the array on constitutional grounds (R.p. 37) and that such waiver was purposely and intentionally made. The Court entered an order dissolving the injunction issued by Judge Carr restraining the Warden from carrying out Petitioner's execution (R.p. 39), but the Court issued a stay of execution (R.p. 40) until the Petitioner could exhaust his right to have this proceeding reviewed by the Supreme Court of North Carolina. The Petitioner then filed petition for certiorari in the Supreme Court of North Carolina (See IN THE MATTER OF IMPRISONMENT OF LAFAYETTE MILLER—Fall Term, 1952—First District, case No. 1), and the Supreme Court of North Carolina granted certiorari on the 26th of August, 1952.

FACTS

The matter now before this Court arose out of a cruel, vicious and brutal murder committed by the Petitioner on the 21st of November, 1951. A narrative of the facts established by the State when the Petitioner was tried for this murder in the Superior Court of Beaufort County at the January Term, 1952, is set forth in the answer of the State to the petition for certiorari filed in this cause, and we quote this narrative again as follows:

"On or about the 21st of November, 1951, at about 9:00 or 9:30 o'clock at night, Harvey C. Boyd, a young man 21 years of age, was killed by the Petitioner, Lafayette Miller, while the said Harvey C. Boyd and his wife, Opal Boyd, were in their bedroom preparing to go to bed; the Petitioner, Lafayette Miller, killed the said Harvey C. Boyd in a cold, ruthless and barbaric manner by creeping up to the window where his victim was preparing for bed and by shooting him with a shotgun when his victim, the said Harvey C. Boyd, was totally unaware of his presence and had no opportunity or chance to defend himself or to attempt to save his life; that there is no credible evidence that the victim, Harvey Boyd, or his wife, Opal Boyd, had ever seen the Petitioner, Lafayette Miller before this murder or that they had ever said or done anything in their lives that could possibly furnish any motive or reason, cause or excuse for the murder perpetrated by the Petitioner; that immediately after the Petitioner, Lafayette Miller, had, with malice, aforethought, and with premeditation and deliberation, killed his victim, Harvey Boyd, he compelled his victim's wife, Opal Boyd, to bring him the keys to his victim's car and then compelled Opal Boyd to unlock the back compartment or trunk of the car and forced her to get into it, and after driving some time, the said Lafayette Miller was stopped by two highway patrolmen of North Carolina who, hearing the screams and calls of Opal Boyd, released her from the back compartment or trunk of said automobile and took the Petitioner into custody; that said highway patrolmen then returned to the home of the murdered man, Harvey Boyd, and found the body of Harvey Boyd lying on the floor in the room; that the said Lafayette Miller subsequently admitted and confessed that he shot his victim, Harvey Boyd, in order to get his automobile, and because he particularly liked the automobile that Boyd owned."

As a result of this murder, the Petitioner, Lafayette Miller, was indicted on a bill of indictment by the grand jury of Beaufort County for the crime of murder in the first degree. It having been made to appear that the Petitioner was with-

out funds to employ counsel, the Court appointed two competent and skillful attorneys, whose qualification appear in record. The Petitioner was tried in the Superior Court of Beaufort County before a trial jury selected from a special venire of 125 jurors drawn from the jury box of Martin County by a child under ten years of age. This venire included 24 Negroes, and three Negro jurors actually served on the trial jury which convicted Petitioner of murder in the first degree. During the trial, the Petitioner, contrary to the advice of his counsel, insisted that he be allowed to testify as a witness in his own behalf. The Petitioner testified in his trial to a state of facts which, on his own evidence, made him guilty of murder in the first degree. A transcript of the evidence offered in the trial of Petitioner in Beaufort County was filed by the State in the office of the Clerk of the Supreme Court of North Carolina before this matter was considered by the Court.

The Petitioner was duly sentenced to death as provided by the law of the State of North Carolna since the trial jury, on which served three members of Petitioner's race, made no recommendation of life imprisonment. Even the members of Petitioner's own race on the jury could see no extenuation or excuse for the Petitioner's vicious and criminal conduct. In the Petitioner's trial, counsel for the Petitioner did not file any motion to quash the bill of indictment on grounds of arbitrary and systematic race exclusion from the grand jury, nor was any challenge made to the array of the trial jurors. Counsel for Petitioner at the trial were well aware of the procedure and law with respect to racial discrimination in the selection of grand and petit jurors (evidence of H. S. Ward, R.pp. 116-119). For the reasons shown in the record, counsel for Petitioner apparently decided that it would not be to the best interest of their client's cause to interject a racial issue into the trial and deliberately and with choice refrained from raising this issue.

After Petitioner's conviction of murder in the first degree, counsel for Petitioner in the trial gave the usual notice of appeal to the Supreme Court of North Carolina. On the 29th

of February, 1952, counsel for Petitioner in the Beaufort County trial filed a motion in the Supreme Court of North Carolina, in which it was requested that they be allowed to withdraw the appeal because they had examined the record and evidence and were unable to assign any error in the trial (see R.p. 11). During this time, application had been made to the Governor of North Carolina for commutation of sentence. An examination was made of the Petitioner by a competent psychiatrist, which examination was made at the instance of the Governor of North Carolina. This psychiatrist found that the Petitioner was sane, mentally competent and legally accountable for his acts and conduct. The Governor of North Carolina held a hearing in which attorneys for the Petitioner (Petitioner's present counsel) appeared and asked that the sentence be commuted to life imprisonment. The Governor of North Carolina, after considering Petitioner's plea, came to the conclusion that he had had a fair trial, that no jury discrimination had been practiced and that he had not been denied any constitutional rights and declined to extend executive clemency in Petitioner's case.

After counsel for Petitioner in the Beaufort County trial had filed their motion to withdraw Petitioner's appeal, the Attorney General docketed the record and moved to dismiss the appeal according to the rules of Court, and Petitioner's appeal was dismissed. (STATE v. LAFAYETTE MILLER, 235 N. C. 394, 70 S.E. (2d) 2).

ARGUMENT

I

ELIGIBLE NEGRO CITIZENS WERE NOT INTENTIONALLY EXCLUDED FROM SERVICE ON THE GRAND JURY WHICH INDICTED PETITIONER.

The trial court heard this matter on a petition filed under the North Carolina Post-Conviction Hearing Act for the express purpose of determining whether or not the grand jury which indicted the Petitioner had been unconstitutionally organized because of race discrimination. The Petitioner was

tried by a jury summoned from Martin County. It clearly appeared that there had been no race discrimination in selecting the trial panel since it consisted of 83 white persons and 24 Negroes, and counsel for Petitioner did not challenge the array or move to quash the venire from Martin County because of any alleged race discrimination. Indeed, counsel for Petitioner stated on the hearing of the proceeding that they "do not attack the Martin County jury in this hearing." (See R.p.p. 45 & 50.)

We are, therefore, concerned only with the constitution of the grand jury in Beaufort County which indicted the Petitioner for murder. The evidence in the case is lengthy, but it is all summarized in the ultimate facts found by the trial court which appear on R.pp. 18 through 40. We conclude that it is unnecessary to discuss the legal authorities in this case. Mr. Justice Ervin set forth and collected the pertinent legal authorities in his opinion, and there is no dispute about the abstract legal principles involved. A trial judge of the State Court has carefully and patiently reviewed all of the evidence, and from a factual standpoint has found that there was no intentional racial discrimination in the selection of the grand jury. The Supreme Court of North Carolina has carefully reviewed all of the facts, and Mr. Justice Ervin, writing for the Court, has gone carefully into the evidence and has set forth his discussion of the facts in detail in the opinion of the Court. (See Appendix, pp. 16 through 44.) We feel that it would unduly encumber the record to go over the same points and advance the same arguments, the only change being our version and our language, according to our style and taste of statement. We, therefore, refer the Court to the findings of fact of the trial judge and to the opinion of the Supreme Court of North Carolina for the simple reason that we cannot improve upon these statements.

II

THE PETITIONER INTENTIONALLY WAIVED THE RIGHT TO ASSERT ANY CONSTITUTIONAL OBJECTIONS TO THE SELECTION OF THE GRAND JURY.

The Petitioner was represented by a skilled and efficient counsel. (See R.pp. 116 through 119; see also R.pp. 132 through 135; see findings of fact by the trial court judge, R.pp. 22 & 23.)

These attorneys were familiar with the law of the State and the court procedure of the State. They were also familiar with the constitutional principles decided by this Court that colored persons had a right to be indicted by grand juries selected without intentional racial discrimination. They considered the whole matter and decided that it was better not to file any motion to quash the panel of grand jurors, and being fully aware of the law and procedure, deliberately and purposely decided not to raise such question. As will be seen from the record, this was done in good faith, and, therefore, the Petitioner cannot now assert the unconstitutionality of the organization of the grand jury by means of the North Carolina Post-Conviction Hearing Act. We, therefore, contend that this Court has expressly held (JENNINGS v. ILLINOIS, 342 U. S. 104, 96 L. ed. 119) that: "Where, as here, a Federal claim can be raised at the trial, it may be forfeited by failure to make a timely assertion of the claim."

Furthermore, it is provided by statute of the State of North Carolina that such claims as to the selection of jurors must be asserted at the time of trial. The North Carolina statute is as follows:

> "§ 9-26. *Exceptions for disqualifications.* — All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived. But no indictment shall be quashed, nor shall judgment thereon be arrested, by reason of the

fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue."

It is undoubtedly true that constitutional rights can be waived, both in criminal and in civil cases. The reason for permitting the waiver of constitutional rights in criminal cases is very aptly phrased in U. S. v. HOYT, 53 F. (2d) 881, 885, where the Court said:

"Constitutional rights are not fixed and cannot be worn by a party as if they were an impervious armor through which he cannot be reached."

McAULIFFE v. MAYOR OF NEW BEDFORD, 155 Mass. 216, 219, 29 N.E. 517
GITLOW v. KIELY, (D.C.), 4 F. (2d) 227

It has been recognized in North Carolina for some time that constitutional rights can be waived, and the Supreme Court of North Carolina has recognized such constitutional waivers in many cases, some of which are as follows:

EX PARTE STEELE, 220 N.C. 685 (Cert. Den. 316 U.S. 686, 86 L. ed. 1758)
STATE v. ANDERSON, 228 N.C. 720, 47 S.E. (2d) 1
STATE v. KIRKSEY, 227 N.C. 445, 42 S.E. (2d) 613
CAMERON v. McDONALD, 216 N.C. 712, 6 S.E. (2d) 497
IN RE WEST, 212 N.C. 189, 193 S.E. 134
STATE v. HARTSFIELD, 188 N.C. 357, 124 S.E. 629
STATE v. JONES, 181 N.C. 543, 106 S.E. 827
STATE v. MITCHELL, 119 N.C. 784, 25 S.E. 783
STATE v. DOUGLASS, 63 N.C. 501

The United States Supreme Court recognizes that constitutional rights can be waived in criminal cases. (See PARKER v. ILLINOIS, 333 U. S. 471, 92 L. ed. 886.)

We have already pointed out that in the case of JENNINGS v. ILLINOIS, *supra,* the Court said that constitutional rights could be waived, citing YAKUS v. U. S., 321 U. S. 414, 444,

88 L. ed. 834. We desire to cite further cases of the Supreme Court of the United States on this same question:

PIERCE v. SOMERSET RY., 171 U.S. 641, 43 L.ed. 316
JOHNSON v. ZERBST, 304 U.S. 458, 82 L.ed. 1461
YAKUS v. U. S., 321, U.S. 414, 444, 88 L.ed. 834
HAWK v. OLSEN, 326 U.S. 271, 90 L.ed. 61
O'NEIL v. VERMONT, 144 U.S. 323, 331
BARBOUR v. GEORGIA, 249 U.S. 454, 460
WHITNEY v. CALIFORNIA, 274 U.S. 357, 360, 362, 380
SEABOARD AIR LINE v. WATSON, 287 U.S. 86
JOHN v. PAULLIN, 231 U.S. 583, 585

Likewise, in the lower Federal Courts, the same question has been decided many times, and we would like to call to the Court's attention some cases decided by the various United States Circuit Courts of Appeals as follows:

KEY v. UNITED STATES, 26 F. (2d) 241
JONES v. OKLA. CITY, 78 F. (2d) 860
U. S. v. HOYT, 53 F. (2d) 881
CARRUTHERS v. REED, 102 F. (2d) 933
BEARD v. SANFORD, 105 F. (2d) 141
U. S. v. NAPELA, 28 F. (2d) 898
BARKMAN v. SANFORD, 162 F. (2d) 592
JACKSON v. BRADY, 133 F. (2d) 476 (Cert. Den. 319 U.S. 746, 87 L.ed. 702)

There are also many decisions by the Courts of our sister States on the same point. It would consume too much space to quote from all of these cases, but we have made investigation, and we, therefore, cite certain cases from the various States on this point as follows:

VERNON v. STATE, 200 So. 560; Cert. Denied in
VERNON v. WILSON, 313 U.S. 559, 85 L.ed. 1519 (Ala.)
HONDA v. PEOPLE, 141 P. (2d) 178, 184 (Colo.)
WILCOXON v. ALREDGE, 15 S.E. (2d) 873, 146 A.L.R. 365 (Ga.)
EX PARTE MONTAW, 236 P. (2d) 509 (Okla.)
LENOIR v. STATE, 80 A. (2d) 3 (Md.)

TRUMAN v. HANN, 48 N.W. (2d) 418 (Neb.)
STATE v. GRIFFITH, 81 A. (2d) 382 (N.J.)
SILLENAR v. STATE, 91 N.E. (2d) 178 (Ind.)
BROWN v. STATE, 37 N.E. (2d) 73 (Ind.)
PINES v. DIST. COURT, 10 N.W. (2d) 574 (Iowa)
STATE v. BERG, 21 N.W. (2d) 777 (Iowa)
STATE EX REL WALLACH v. OEHLER, 154 S.W. (2d) 781 (Mo.)
COPPAGE v. STATE, 71 P. (2d) 509 (Okla.)
STATE v. GUNKEL, 63 P. (2d) 376 (Wash.)

In LENOIR v. STATE, *supra*, in dealing with this question, the Court said, quoting with approval from U. S. EX REL JACKSON v. BRADY, *supra*, and also quoting in KLICKMAN v. STATE, 190 Md. 516, 526, 60 A. (2d) 216, as follows:

> "Where, in a State criminal trial, the defendant is represented by competent and experienced counsel, even constitutional rights known or presumed to be known to counsel to exist must be held to have been waived if not made at all or inadequately presented."

The precise question here involved has been decided against the Petitioner in VERNON v. STATE, *supra;* HONDA v. PEOPLE, *supra;* WILCOXON v. ALREDGE, *supra*, and in CARRUTHERS v. REED, *supra*.

CONCLUSION

The question of the constitutionality of the selection of the grand jury in this case is not substantial and is not of sufficient importance to warrant consideration by the United States Supreme Court. Counsel for Petitioner have never contended that there was any other substantial error in Petitioner's trial, and they have never contended that he is not guilty of murder in the first degree. Indeed, it is pointed out by the Supreme Court of North Carolina that Petitioner is guilty according to the honest belief of his attorneys on his own evidence and on his own sworn statement that he made at the trial. If any validity at all is to be given to the careful

findings of the trial judge and the careful consideration of the Supreme Court of North Carolina in this case (BROWN v. ALLEN, 344 U. S. .....), then this certiorari should not be granted, but to the contrary, should be denied.

Respectfully submitted,

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APPENDIX

North Carolina Post-Conviction Hearing Act

Art. 22. Review of the Constitutionality of Criminal Trials

§ 15-217. *Institution of proceeding; service of petition upon solicitor.*—Any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work on the roads and highways of the State under the supervision of the State Highway and Public Works Commission, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction may institute a proceeding under this article. The proceeding shall be commenced by filing with the clerk of the superior court of Wake County, or in any county in which the conviction took place, a petition with a copy thereof, verified by affidavit. The petitioner shall serve another copy upon the solicitor of the solicitorial district who prosecutes the criminal docket of the superior court of the county in which said petion is filed, and said service of petition shall be by any of the methods provided by law for the service of process or by mailing said petition to the home address of said solicitor by registered mail, with return receipt requested. If said copy of petition is served by registered mail, the return receipt shall be filed with the clerk of the superior court of the county in which said petition is filed. The clerk shall place upon the criminal docket the petition upon his receipt thereof, and after service of the petition upon the solicitor of the district as above provided. No proceeding under this article shall be commenced more than five years after rendition of final judgment resulting from said conviction, or more than three years after the effective date of this article, whichever is later, unless the petitioner alleges facts showing that the delay was not due to laches or negligence on his part. (1951, c. 1083, s. 1.)

§ 15-218. *Contents of petition; waiver of claims not alleged.*—The petition shall identify the proceeding or trial in which the petitioner was convicted, give the date of the rendition of the final judgment claimed of, and shall clearly set forth the respects with which petitioner's constitutional rights were violated, and that the constitutional questions raised have not heretofore been raised or passed upon by any court of competent jurisdiction. The petition shall have attached thereto affidavits, records or other evidence supporting its allegations or shall state why the same are not attached. The petition shall also identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussions of authorities shall be omitted from the petition. Any claim of substantial denial of constitutional rights not raised or set forth in the original or any amended petition is waived. (1951, c. 1083, s. 1.)

EDITOR'S NOTE.—It seems that the word "claimed" in line four was inadvertently inserted in place of "complaint," which was probably the word the legislature intended to use.

15-219. *Petitioner unable to pay costs or procure counsel.*—If the petition alleges that the petitioner is without funds to pay the costs of the proceeding, and is unable to give a costs bond with sureties for the payment of the costs for the proceeding and is unable to furnish security for costs by means of a mortgage or lien upon property to secure the costs, the court may order that the petitioner be permitted to proceed to prosecute such proceedings without providing for the payment of costs. If the petitioner is without counsel and alleges in the petition that he is without means of any nature sufficient to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means sufficient to procure counsel. The court shall fix the compensation to be paid such counsel which, when so determined, shall be paid by the county in which the conviction occurred. (1951, c. 1083, s. 1.)

§ 15-220. *Answer of the State; withdrawal of petition; amendments.*—Within 30 days after the date of the service of the petition upon the solicitor of the district, or within such further time as the court may fix, the solicitor shall answer or move to dismiss on behalf of the State. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may, in its discretion, grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may, in its discretion, make such orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time for filing any pleading other than the original petition, as shall seem to the court appropriate, just and reasonable. (1951, c. 1083, s. 1.)

§ 15-221. *Evidence to be received upon hearing.*—The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and the court shall pass upon all issues or questions of fact arising in the proceeding without the aid of a jury. In its discretion, the court may order the petitioner brought before the court for the hearing. When said hearing is completed, the court shall make appropriate findings of fact, conclusions of law thereon and shall enter judgment upon said hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings under which the petitioner was convicted, and such supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper. Such proceeding may be heard by any resident judge of the district or by any regular or special judge holding the courts of the district, and such proceeding may be heard at term, in chambers, or in vacation, or at any regular or special term of court. If said proceeding is set for hearing at any time other than a regular term of the court of the county in which the petition is filed, then notice of time and place of hearing shall be served upon the solicitor of the district. (1951, c. 1083, s. 1.)

§ 15-222. *Review by application for certiorari.*—Any final judgment entered upon such a petition and proceeding may be reviewed by the Supreme Court of North Carolina upon application for a writ of certiorari brought within 60 days from the entry of the judgment in such proceeding. The law of this State governing the application, granting and disposition of writs of certiorari shall be applicable to any application for writ of certiorari brought under the provisions of this article for the purpose of seeking a review of such judgment or proceeding. (1951, c. 1083, s. 1.)

OPINION OF SUPREME COURT OF NORTH CAROLINA

LAFAYETTE MILLER v. STATE OF NORTH CAROLINA

(FILED 30 JANUARY, 1953.)

Proceeding under the North Carolina Post-Conviction Hearing Act heard by *Clawson L. Williams, J.*, at the May Term, 1952, of the Superior Court of Beaufort County, and reviewed by the North Carolina Supreme Court upon a duly granted writ of *certiorari*.

The North Carolina Post-Conviction Hearing Act originated in Chapter 1083 of the 1951 Session Laws. It has since been codified as Article 22 of Chapter 15 of the General Statutes. See: 1951 Cumulative Supplement.

The petitioner, Lafayette Miller, a Negro, was indicted by a grand jury at the 14 January, 1952, Term of the Superior Court of Beaufort County for the murder of Harvey C. Boyd, a white man. He was tried by a petit jury on this charge at the same term. The petit jury found the petitioner guilty of murder in the first degree, but did not recommend that his punishment should be imprisonment for life in the State's prison. In consequence, Judge Williams, who presided at the trial, pronounced judgment of death against the petitioner in conformity with G.S. 14-17. The appeal of the petitioner was dismissed and the judgment of death imposed on him was affirmed by the North Carolina Supreme Court on 9 April, 1952, upon grounds set out in the opinion

reported in *S. v. Miller,* 235 N.C. 394, 70 S.E. 2d 2. As the result of this action, Friday, 25 April, 1952, was automatically fixed by G.S. 15-194 as the time for carrying out the judgment of death.

One day before that date, *i.e.,* on 24 April, 1952, the petitioner, who is imprisoned in the Central Prison, commenced this proceeding against the State of North Carolina under the provisions of the North Carolina Post-Conviction Hearing Act and obtained a judicial order in it staying the execution of the judgment of death until the proceeding could be judicially determined. The petition filed by the petitioner in this proceeding invokes in general terms the provisions of the Post-Conviction Hearing Act embodied in G.S. 15-217, which specify that "any person imprisoned . . . in Central Prison . . . who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction, may institute a proceeding under this article." The petition asserts that the petitioner's constitutional rights were violated in the original criminal action in these specific respects: "That he was indicted and tried by a grand jury and a petit jury in and for Beaufort County from which juries members of petitioner's race, to wit, Negroes, have been arbitrarily, systematically and discriminatorily excluded over the years, wholly and solely on account of their race and/or color." Within the thirty days specified by G.S. 15-220, *i.e.,* on 2 May, 1952, the State of North Carolina, acting through the solicitor of the judicial district embracing Beaufort County, answered the petition. The answer denies all the crucial averments of the petition; alleges in detail that there was no discrimination against Negroes in the selecting, drawing, and summoning of the grand and petit jurors who indicted and convicted the petitioner; and pleads in detail that the petitioner, acting through competent counsel, waived any right to charge any such discrimination by his conduct at the trail of the original criminal action.

The proceeding was tried at the May Term, 1952, of the Superior Court of Beaufort County by Judge Williams, who heard the evidence offered by the parties and passed upon the issues of fact arising in the proceeding without the aid of a jury in accordance with the provisions of the Post- Conviction Hearing Act codified as G.S. 15-221. The evidence is incorporated in the transcript of the record in this proceeding.

The essential facts are either judicially known or may be gleaned from the record proper in *S. v. Miller, supra;* the application of the petitioner for the writ of *certiorari* for the review of this proceeding; the answer of the State to that application; and the transcript of the record in this proceeding. These facts and the inferences supported by them are stated in chronological order in the numbered paragraphs which immediately follow.

1. Beaufort County is an agricultural, lumbering, and maritime county, having a landed area of 531,840 acres. The census of 1940 divides its total population of 36,431 into these two racial groups: 22,632 whites, and 13,799 Negroes.

2. Negroes served on occasion upon juries in Beaufort County prior to 1935.

3. Ever since the "Scottsboro Cases" were decided by the United States Supreme Court in 1935, the county attorneys of Beaufort County have been careful to advise the Board of Commissiioners of Beaufort County that discrimination in the selection of jurors on the grounds of race or color is forbidden by law; that it is the legal duty of the Board to select for jury service without regard to their race or color persons qualified by the law of North Carolina to act as grand and petit jurors in Beaufort County; and that citizens of North Carolina over the age of twenty-one years residing in Beaufort County are qualified by the law of North Carolina for jury service in Beaufort County if they "are of good moral character and have sufficient intelligence to serve as members of grand and petit juries." (See: G.S. 9-1; *Hinton v. Hinton,* 196 N.C. 341, 145 S.E. 615.)

4. Ever since 1935, the Board of Commissioners of Beau-

fort County has earnestly endeavored to select for jury service in the county without regard to their race or color persons possessing the qualifications prescribed by the State law for grand and petit jurors. As a consequence, "there have . . . been . . . very few terms of court" in Beaufort County since 1935 "when there have not been colored people on the grand jury, or the petit jury, or both." In 1937, the North Carolina Supreme Court upheld the decision of the Superior Court of Beaufort County in *S. v. Bell,* 212 N.C. 20, 192 S.E. 852, adjudging that "no discrimination was made between persons belonging to the white or negro race" in the selection of the jury panel involved in that case. There has been an "observable increase" in the number of Negroes called for jury service in Beaufort County since *S. v. Bell, supra,* was decided.

5. The jury list and jury box of Beaufort County have been completely revised during each odd numbered year as required by the statute incorporated in G.S. 9-1. The Beaufort County jury panel and the Beaufort County special venire under scrutiny in this proceeding were drawn from the jury box for the biennium beginning in July, 1951.

6. The jury box of Beaufort County for the biennium beginning in July, 1951, was the result of the official acts described in this paragraph. The Clerk of the Board of Commissioners of Beaufort County laid before the Board at its regular meeting on the first Monday in June, 1951, data from the tax returns of Beaufort County for the preceding year, showing the names of the 10,400 white and the 4,536 Negro taxpayers of Beaufort County. In so doing, the Clerk acted in substantial compliance with the mandatory provisions of G.S. 9-1. (See: *S. v. Brown,* 233 N.C. 202, 63 S.E. 2d 99.) The action of the Clerk was well calculated to place before the Board the names of virtually all persons possessing any qualifications for jury service in Beaufort County because the tax returns were required by law to disclose the names of all male residents over twenty-one and under fifty years of age, the names of all residents owning dogs, the names of all residents owning other tangible personal property having a value exceeding three hundred dollars, and the names

of all persons owning real property in the county. The Board of Commissioners of Beaufort County selected from the data laid before it by its Clerk the names of those citizens of the State over twenty-one years of age residing in Beaufort County whom it decided to be of good moral character and sufficient intelligence to serve as members of grand and petit juries, and the Clerk of the Board took the names thus selected by the Board and made out a new jury list for the county consisting of those names only. In so doing, the Board and its Clerk acted in strict accord with the procedure established by G.S. 9-1. Subsequent to these events, to wit, at its regular meeting on the first Monday in July, 1951, the Board of Commissioners of Beaufort County caused the names on the new jury list to be copied on small scrolls of paper of equal size, and put into the division of the county jury box marked No. 1 after such jury box had been emptied of its previous contents. In so doing, the Board acted in complete compliance with G.S. 9-2. Neither the jury list nor the scrolls indicated in any way the race or color of the persons whose names they bore. The county jury box contained two divisions marked No. 1 and No. 2, respectively, and was equipped with two separate locks as required by G.S. 9-2. After the scrolls containing the names of those selected for jury service during the biennium beginning in July, 1951, had been placed in it, the jury box was locked. Subsequent to that event the key to one of the locks was kept by the Sheriff of Beaufort County, the key to the other lock was kept by the Chairman of the Board of Commissioners of Beaufort County, and the jury box was kept in the custody of the Clerk of the Board, all in obedience to G.S. 9-2.

7. The Board of Commissioners of Beaufort County consisted of Carl Alligood, Irvin Hodges, A. D. Swindell, Mark Taylor, and Max F. Thompson at the times specified in the preceding paragraph. Irvin Hodges was Chairman of the Board. These Commissioners were elected to their offices by popular vote. One of them resided in each of the five geographical subdivisions of the county. Their administration of county government gave them many and varied contacts

with substantial portions of both of the racial groups represented in the population of Beaufort County. As a result of these circumstances, the Commissioners possessed in the aggregate a dependable and extensive personal knowledge of the qualifications of both white and Negro residents of Beaufort County for service as members of grand and petit juries. Moreover, they make fair and honest efforts to determine by appropriate inquiries of well informed persons the qualifications for jury service of all resident taxpayers of the county not personally known to them whose names appeared in the data laid before them by their Clerk, irrespective of the race or color of such taxpayers. When it made its selection of persons to perform jury service in the county during the biennium beginning in July, 1951, the Board of Commissioners of Beaufort County selected without any regard whatever for their race or color citizens of the State over twenty-one years of age residing in Beaufort County whom it knew or found by fair inquiry to be possessed of good moral character and sufficient intelligence to serve as members of grand and petit juries. The Board did not intentionally exclude any Negroes from jury service because of their race or color. The attitude of each Commissioner, and the final result of the corporate labors of all of them are accurately epitomized in certain testimony given by Chairman Irvin Hodges, a witness for the petitioner, on the hearing of this proceeding in the Superior Court. When this testimony is rearranged in proper order for the sake of clarity, it comes to this: "I made . . . inquiry regarding those persons . . . I did not know, both white and colored, as to their qualifications . . . I made no effort to discriminate because of race or color. I made inquiry only on qualifications of jurors. . . . There was no rejection of names, white or colored, for any reason . . . other than. . . . (lack of) qualifications . . . Some whites did not go in the box, and some coloreds did not go in . . . I determined the eligibility of Negroes . . . the same way I did for the whites. . . . I have no idea as to how many Negro names are in the jury box, but I know there are right many . . . If we think that a Negro is just as capable to perform jury service as a white person, his name goes into the box. There are not as many Negroes

in the box as white. I think that the number of Negro names to white names in the box is pretty close to a pro rata part. By pro rata part, I mean according to the total number of taxpayers, white and colored." It appeared at the trial that it was impossible to determine by an examination of the court records, the jury list, or the jury box of Beaufort County how many white persons and how many Negroes were selected for jury service during the biennium beginning in July, 1951, for the very simple reason that the court records, the jury list, and the scrolls in the jury box did not indicate the race or color of those selected.

8. The petitioner, a Negro man aged about twenty years, was arrested on the night of 21 November, 1951. He was forthwith formally charged by warrant with an offense punishable by death, namely the first degree murder of Harvey C. Boyd, a white man aged twenty-one years. His case was set for trial at the regular term of the Superior Court of Beaufort County scheduled to convene on Monday, 14, January, 1952.

9. Several weeks before that date Judge Chester Morris, the judge then holding the courts of the judicial district embracing Beaufort County, appointed Hallet S. Ward and James B. McMullan, highly reputable members of the Beaufort County bar, to defend the petitioner. Judge Morris took this action under G.S. 15-4.1 because of the petitioner's financial incapacity to retain counsel of his own choosing. Ward and McMullan are competent lawyers. Indeed, Ward is one of the outstanding trial lawyers of North Carolina. He was admitted to the North Carolina Bar in 1893 after graduating in law at the University of North Carolina, and from that time to the present day has actively practiced his profession in the courts of Beaufort and neighboring counties. He has resided and maintained his law office at the county seat of Beaufort County since 1905, and in consequence has had personal knowledge of the constitution of grand and petit juries in Beaufort County during all the times set out above. Notwithstanding his long career at the bar, Hallet Ward's eye is not dim, nor his natural force

substantially abated. He is rightly noted for his sound judgment as a counsellor, his ability and zeal as an advocate, and his undiluted intellectual honesty. James B. McMullan is an alert and well trained young lawyer who has practiced at the Beaufort County bar about two and a half years.

10. Ward and McMullan consulted with the petitioner shortly after they were assigned to defend him, and then made the factual and legal investigations necessary to enable them to present at the trial any available matter in defense or mitigation of the charge against their client. In so doing, they ascertained that there were two versions of the homicide under investigation, one based on evidence at the disposal of the State, and the other resting upon the unsupported assertions of the petitioner.

11. The State's version was as follows: Neither Harvey C. Boyd nor his wife, Opal Boyd, had any personal acquaintance with the petitioner. On the night of 21 November, 1951, the petitioner armed himself with a shotgun, and went to the home of Harvey C. Boyd in a rural section of Beaufort County with intent to kill him. The petitioner concealed himself in the darkness outside the home until Harvey C. Boyd and his wife, Opal Boyd, entered their bedroom preparatory to retiring. The petitioner then crept to a window of the bedroom, and shot and killed Harvey C. Boyd, who was ignorant of both the presence and purpose of his assailant. Immediately after the slaying, the petitioner imprisoned the deceased's wife, Opal Boyd, in the back compartment or trunk of the deceased's automobile, and drove such automobile away. As he was driving the deceased's automobile along a public highway at a considerable distance from the place of the homicide, the petitioner was stopped by two State highway patrolmen. The patrolmen heard the screams of a woman emanating from the rear compartment or trunk of the halted automobile. They opened the compartment or trunk, found Opal Boyd confined in it, released her, and arrested the petitioner, who afterwards voluntarily stated that he shot Harvey C. Boyd in order to obtain his automobile.

12. The petitioner's version was that he became personally acquainted with Mrs. Opal Boyd when he was employed to mow grass in the yard at the Boyd home; that Mrs. Boyd told him that she and her husband were "not getting along good," and that she wanted him to kill her husband; that he promised her that he would do so on a specified night; that he armed himself with a shotgun and went to the Boyd home on the appointed night for the purpose of killing Boyd; that on his arrival there, he went to an open window, and observed Boyd and his wife inside the house; that Mrs. Boyd saw him, came into the yard, and told him to shoot Boyd; that he advised Mrs. Boyd that he had never "done nothing like that" and suggested that she "do it"; that Mrs. Boyd replied that she could not "shoot a gun"; that he "fixed the gun," handed it to her, and told her to shoot Boyd; and that Mrs. Boyd took the gun and shot Boyd.

13. Ward and McMullan knew that under G.S. 14-17 "a murder . . . perpetrated by means of . . . lying in wait, . . . or by any other kind of willful, deliberate and premeditated killing, or . . . committed in the perpetration or attempt to perpetrate any . . . robbery" is murder in the first degree. As the result of their investigation, they came to these deliberate and honest conclusions: (1) That under either version of the homicide, the petitioner was guilty of murder in the first degree; (2) that it was virtually certain that the petitioner would be found guilty of murder in the first degree by any petit jury impaneled to pass upon the question of his guilt or innocence; and (3) that the petitioner could not possibly be saved from capital punishment for the homicide unless the trial jurors could be persuaded to exercise the discretionary power vested in them by G.S. 14-17 and recommend that his punishment should be imprisonment for life in the State's prison rather than death. Ward and McMullan based their subsequent defense of the petitioner upon these considered and sincere convictions.

14. Ward and McMullan pondered the question whether they ought to challenge the validity of any indictment returned against the petitioner by a Beaufort County grand

jury on the theory that qualified Negroes had been intentionally excluded from the grand jury on account of their race or color. They reached the deliberate and honest determination that they would not be justified in interposing any such challenge for two reasons somewhat alternative in character. Their primary reason was that they firmly believed that qualified Negroes had not in fact been purposely excluded from the jury list and the jury box of Beaufort County on account of their race or color, and that in consequence the racial exclusion theory was devoid of merit. Their secondary reason was based on different considerations. They knew that the grand jury hears no evidence save that submitted to it by the prosecution; that the grand jury does not pass upon the guilt or innocence of the accused, but, on the contrary, merely decides whether or not the evidence of the prosecution, standing alone, reasonably justifies putting him on trial before a petit jury; and that the grand jury decides this question adversely to the accused whenever as many as twelve of its eighteen members so vote. They were satisfied, moreover, that a new grand jury, wholly unexceptionable in character, would be impaneled in Beaufort County at an early date if the court, perchance, should take what they deemed to be an inconceivable course and quash an indictment against the petitioner on the theory that racial exclusion had been purposely practiced in the selection of the grand jurors returning such indictment; that such new grand jury would indict the petitioner anew immediately after hearing the testimony of the prosecution, no matter what its racial composition might be; and that in consequence the quashing of an indictment against the petitioner on the racial exclusion theory would cause a mere temporary delay in his trial without effecting any real benefit to him.

15. At least twenty days before the regular term of the Superior Court of Beaufort County scheduled to begin on Monday, 14 January, 1952, the Board of Commissioners of Beaufort County caused a child not more than ten years of age to draw from the county jury box out of the division marked No. 1 fifty-seven scrolls to the end that a jury panel

might be provided for such term in obedience to G.S. 9-3. It appears inferentially that three of the scrolls were destroyed under G.S. 9-7 because the persons whose names were inscribed on them had either died or removed from the county. The fifty-four persons whose names appeared on the remaining scrolls were summoned to appear at the term in question for services as grand and petit jurors.

16. The Superior Court of Beaufort County convened on Monday, 14, January, 1952, with Judge Williams presiding. Under his direction, the names of the fifty-four persons constituting the jury panel for the term were written on scrolls, which were put into a hat. Eighteen of the scrolls were drawn out of the hat by a child under ten years of age. The eighteen persons whose names were inscribed on the scrolls thus drawn from the hat were sworn and impaneled as grand jurors, and served as such during the term as prescribed by G.S. 9-24. All of the eighteen grand jurors belonged to the white race. The remaining thirty-six persons on the panel had no connection whatever with the trial of the petitioner. The only evidence at the hearing of this proceeding relating to the race of these persons appears in this somewhat conjectural statement of the petitioner's witness Bryan Marslender: " I do not think there were any Negroes on the regular jury panel for that term of court from which the grand jury was drawn. I don't recall seeing any."

17. After hearing the State's evidence, the grand jury returned into open court as a true bill an indictment charging the petitioner with the first degree murder of Harvey C. Boyd. Counsel for the petitioner did not undertake to challenge the validity of the indictment by a motion to quash or otherwise on the theory that Negroes had been intentionally excluded from the grand jury on account of their race or color. Indeed, they deliberately refrained from doing so for the reasons detailed in paragraph 14 of this statement.

18. On his arraignment, the petitioner pleaded "not guilty," and moved the presiding judge that a special venire be sum-

moned from Martin County, another county in the same judicial district, to serve as petit jurors in the criminal action against him. The judge allowed the motion under G.S. 1-86, and directed that the special venire should be drawn from the jury box of Martin County by a child under ten years of age in the presence of the petitioner and his counsel, counsel for the prosecution, and specified officers of Martin County. The special venire was drawn from the jury box of Martin County in strict obedience to the directions of the judge.

19. No qualified Negroes had been excluded from the jury box of Martin County on account of their race or color. Indeed, counsel for the petitioner stated on the hearing of this proceeding that they "do not attack the Martin County jury in this hearing."

20. The special venire from Martin County appeared in the Superior Court of Beaufort County at the appointed time. It consisted of eighty-three white persons and twenty-four Negroes. Counsel for the petitioner did not challenge the array or move to quash the venire from Martin County on the theory that Negroes had been intentionally excluded from the venire on account of their race or color. Indeed, they deliberately refrained from so doing because they firmly believed that no such racial exclusion had occurred and because they were convinced that they could not reasonably expect to secure a jury panel more favorable to the petitioner than that drawn from the jury box of Martin County.

21. Eleven of the requisite twelve petit jurors were obtained from the special venire summoned from Martin County before it was exhausted. Eight of them were white persons and three of them were Negroes.

22. The presiding judge ordered that an additional special venire of thirty persons be summoned from Beaufort County, where the trial was being held, to the end that the trial jury might be completed. In pursuing this course, the judge acted "by consent' 'of counsel for the prosecution and the defense and under G.S. 1-86. Pursuant to this same statute and G.S. 9-30, the presiding judge required the Clerk of the

Board of Commissioners of Beaufort County to bring the county jury box into open court, and caused thirty scrolls to be drawn from the jury box out of the division marked No. 1 by a child under ten years of age in the presence of the petitioner and his counsel. The thirty persons drawn from the jury box in this manner were summoned as the additional special venire from Beaufort County. The transcript of the record makes it plain that two of these special veniremen, to wit, the ones selected as the twelfth and the alternative jurors, were white persons and that one of them, namely Estalla Bland, was a Negro. It does not disclose the race of the other twenty-seven unless that disclosure is made by these somewhat uncertain words of the petitioner's witness Bryan Mars lender: " In my minutes I have the names of 30 persons drawn in the special venire from Beaufort County. One of the jurors drawn from that panel served on the trial jury which tried the petitioner Lafayette Miller, but I do not remember the names. On the panel of 30 drawn for that special venire was the name of Estalla Bland. I have checked the records and find that Estalla Bland is a colored person, living at Pantego."

23. The attorneys for the petitioner did not challenge the array or move to quash the additional special venire from Beaufort County on the theory that Negroes had been intentionally excluded from such venire on account of their race or color. Indeed, they deliberately refrained from so doing because they firmly believed that no such racial exclusion had occurred.

24. The twelfth petit juror and an alternate juror were obtained from the additional special venire from Beaufort County. Both of them were members of the white race. Since the alternate juror did not participate in the decision of the case, the petit jurors who actually tried the original criminal action consisted of nine white persons and three Negroes.

25. When the original criminal action was tried on its merit at the January Term, 1952, of the Superior Court of Beaufort County, the State offered testimony sufficient to show that the petitioner killed Harvey C. Boyd under the

circumstances delineated in paragraph 11 of this statement. The petitioner, who insisted on taking the witness stand despite the advice of his attorneys to the contrary, gave the version of the slaying depicted in paragraph 12 of this statement.

26. The petit jury found the petitioner guilty of murder in the first degree, but did not recommend that his punishment should be imprisonment for life in the State's prison. Judge Williams pronounced judgment of death against him. The petitioner's attorneys excepted to the judgment, and gave notice of appeal from it to the North Carolina Supreme Court. They did not perfect the appeal by serving a statement of case on appeal upon the solicitor for reasons stated in the next paragraph.

27. The attorneys for the petitioner were convinced that the trial which resulted in the conviction and sentence of their client was wholly free of legal error, and that in consequence it would be utterly useless to perfect the appeal to the North Carolina Supreme Court. This consideration induced them to seek executive clemency. Hallet S. Ward made this illuminating statement on the hearing of the proceeding: "I don't know whether I did the right thing or not, but I did an honest thing. I had no exception on that record that I was willing to stand in the Supreme Court, and insist upon, and I have got enough self-respect . . . to want to be able to give a sensible and respectful reason for any position that I take before any court, and I determined, and Mr. McMullan agreed with me, for we conferred upon it several times, that our service to this prisoner consisted of appeal to the Governor to commute the sentence."

28. For the reason stated above, Ward and McMullan made application to the Governor of North Carolina for commutation of the petitioner's sentence to life imprisonment, and were informed by the Governor that the executive department would not consider the application while an appeal by the petitioner was still pending in the courts. In order to remove this bar to the consideration of the application for

executive clemency, Ward and McMullan filed a motion dated 29 February, 1952, in the North Carolina Supreme Court, asserting that they were "unable to assign error to any part of the record or evidence in the cause," and praying for permission "to withdraw the appeal in the cause" on that ground.

29. While this motion was awaiting a hearing, the Attorney-General of North Carolina moved to docket and dismiss the appeal under Rule 17 of the Rules of Practice of the North Carolina Supreme Court, and for an affirmance of the judgment of death. On 9 April, 1952, the North Carolina Supreme Court allowed the motion of the Attorney-General after its own examination of the record proper in the original criminal action revealed that no error appeared on the face of the record. See: *S. v. Miller, supra.*

30. Subsequent to that event, the Governor of North Carolina informed Ward and McMullan that he had investigated the case; that he had had the petitioner examined by a psychiatrist; and that he had found nothing that would justify him in extending executive clemency to the petitioner.

31. After the application for executive clemency had been denied by the Governor, to wit, on 24 April, 1952, Herman L. Taylor, a member of the Wake County bar, and W. Frank Brower, a member of the Durham County bar, brought this proceeding in behalf of the petitioner against the State of North Carolina, and in that way made their initial appearances in the courts as counsel for the petitioner. In instituting and prosecuting this proceeding, Taylor and Brower act without the concurrence of the petitioner's original attorneys, Ward and McMullan.

32. When this proceeding was heard by Judge Williams at the May Term, 1952, the petitioner called these persons to the witness stand: Bryan Marslender, Clerk of the Superior Court of Beaufort County; W. B. Carter, Chairman of the Board of Elections of Beaufort County; D. E. Reddick, the Tax Collector of Beaufort County; William Rumley, the Sheriff of Beaufort County; Jack Harris, a Deputy Sheriff of

Beaufort County; C. C. Duke, the Clerk of the Board of Commissioners of Beaufort County; Irvin Hodges, Carl Alligood, A. D. Swindell, and Mark Taylor, the four surviving members of the Board of Commissioners of Beaufort County; and John I. Morgan, a white citizen of Beaufort County. The State's witnesses at such hearing were Lonnie Dennis, a Negro citizen of Beaufort County; Hallet S. Ward, James B. McMullan, J. D. Grimes, and M. C. Paul, members of the Beaufort County bar; Elbert Peel, the County Attorney of Martin County; L. B. Wynn, the Clerk of the Superior Court of Martin County; and J. S. Getsinger, the Clerk of the Board of Commissioners of Martin County. The petitioner noted four exceptions to the admission of testimony given by Hallet S. Ward. These exceptions have since been abandoned by the petitioner under the Rules of Practice of the North Carolina Supreme Court.

33. There was no discordancy whatever between the testimony of the petitioner's witnesses and that of the State's witnesses at the hearing in this proceeding. The harmonius evidence of the witnesses in this proceeding, the record proper in *S. v. Miller, supra,* the application of the petitioner for the writ of *certiorari* for the review of this proceeding, and the answer of the State to that application reveal the truth of all the matters and things set out in paragraphs 2 to 28, both inclusive, of this statement.

After hearing the evidence in this proceeding, Judge Williams made voluminous findings of fact, conforming, in essential respects, to the matters stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, and 31. He made these conclusions of law in considerable detail thereon: (1) That the petitioner, acting through his original attorneys, waived his alleged constitutional right to challenge the competency of the grand jurors who indicted him by purposely refraining from asserting it in the original criminal action; (2) that the petitioner, acting through his original attorneys, waived his alleged constitutional right to challenge the competency of the petit jurors who convicted him by purposely refraining from asserting it in the original

criminal action; and (3) that no Negroes were intentionally excluded from the grand and petit juries which indicted and convicted the petitioner on account of their race or color. Judge Williams entered judgment declaring that the petitioner is not entitled to any relief in this proceeding, and vacating the judicial order staying the execution of the judgment of death. He stipulated, however, that the vacation of the judicial order staying the execution of the judgment of death should not take effect until the North Carolina Supreme Court had been afforded an opportunity to review his judgment upon *certiorari* under G.S. 15-222.

The petitioner applied to us for a writ of *certiorari* to review the judgment in the proceeding within 60 days from its entry, and we granted his application. He asserts, in substance, that Judge Williams erred "in finding the facts as he did"; in making his conclusions of law thereon; and in entering his judgment.

Taylor & Mitchell and W. Frank Brower for the petitioner.

Attorney-General McMullan and Assistant Attorney-General Moody for the State.

Ervin, J. This is the first proceeding under the North Carolina Post-Conviction Hearing Act to come before the North Carolina Supreme Court.

The trial of the proceeding in the Supreme Court was accordant with the procedure established by the act. G.S. 15-221. After hearing the testimony, the presiding judge made findings of fact in commendable detail, declared his conclusions of law upon them, and entered final judgment adverse to the petitioner.

The findings of fact of the judge are binding upon the petitioner on this review if they are supported by evidence. *S. v. Brown, supra; S. v. Kirksey,* 227 N.C. 445, 42 S.E. 2d 613; *S. v. Henderson,* 216 N.C. 99, 3 S.E. 2d 357; *S. v. Bell, supra; S. v. Walls,* 211 N.C. 487, 191 S.E. 232; *S. v. Cooper,* 205 N.C. 657, 172 S.E. 199; *S. v. Daniels,* 134 N.C. 641, 46 S.E. 2d 743.

The petitioner undertakes to challenge the sufficiency of the evidence to support the findings of fact of the judge by excepting in general terms "to each of the findings of fact . . . set out by the court," and by asserting without specification in his first assignment of error that "the court committed prejudicial error in finding the facts as he did." This exception and this assignment of error fall short of the requirement that "when it is claimed that the findings of fact made by the trial judge are not supported by the evidence, the exceptions and the assignments of error in relation thereto must specifically and distinctly point out the alleged errors." *Burnsville v. Boone,* 231 N.C. 577, 58 S.E. 2d 351. Since the petitioner's life hangs in the balance, we have nevertheless examined and weighed the evidence in this proceeding with the same meticulous and painstaking care we would have employed had he noted appropriate exceptions and assignments of error to all of the findings of fact adverse to him.

The evidence supports the findings of fact. Yea, it necessitates them. It appears, in substance, in paragraph 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 30, and 31 of the statement of facts, which contains a complete history of the original criminal action resulting in the petitioner's conviction and this proceeding as such history is revealed by the record proper in *S. v. Miller, supra,* the application of the petitioner for the writ of *certiorari* for the review of this proceeding, the answer of the State to that application, and the transcript of the record in this proceeding.

We digress at this point to make some incidental observations. In reaching the conclusion that the evidence compels the findings of fact made by the presiding judge, we have not disregarded the arithmetical arguments advanced by the petitioner on the basis of the testimony of his witness D. E. Reddit, the Tax Collector of Beaufort County, and Bryan Marslender, the Clerk of the Superior Court of Beaufort County. The petitioner's assertion that "only 15 Negroes . . . sat as grand jurors" in Beaufort County during the five years next preceding the trial of this proceeding rests solely upon a bit of evidence given by Redditt on his third and final

appearance on the witness stand. On a proper analysis this testimony is destitute of probative value. Redditt had nothing to do with the selecting, drawing, or summoning of persons for jury service in Beaufort County. He had, moreover, no connection with the administration of justice in Beaufort County, or with the keeping of any records relating to that endeavor. He did not, in fact, possess any knowledge whatever of the racial composition of Beaufort County grand juries, and his own evidence on his prior appearances on the witness stand positively negatives any implication that he did. Redditt merely testified on his last visit to the stand that he had made an examination in some unexplained way of 23 unauthenticated writings purporting to be grand jury lists of Beaufort County covering in part the five years next preceding the trial of this proceeding, and that he had "identified 15" of the 414 persons whose names appeared in such writings "to be Negroes." Manifestly this testimony leaves to speculation the racial identities of the other 399 persons listed.

The transcript of the record reveals that 64 weeks of court were held in Beaufort County in the five years preceding the hearing in this proceeding, and that 2,211 persons were drawn for jury service during 43 of these weeks. It does not expressly appear how many persons were drawn for such service during the other 21 weeks because the number drawn for the first week of the May Term, 1949, was not proved at the trial, and the exhibit showing the numbers drawn for the remaining 20 weeks was omitted from the transcript of the record when its evidential contents were settled by stipulation between counsel for the petitioner and the solicitor of the judicial district embracing Beaufort County. Since it was customary to draw no fewer than 36 persons for service as petit jurors during each week of civil court and no fewer than 54 persons for service as grand and petit jurors during each week of criminal court as authorized by G.S. 9-3, it can be inferred with complete assurance that at least 900 persons were drawn for jury service in Beaufort County during the 13 weeks of civil court and the 8 weeks of criminal court included in the 21 weeks set forth above. This being true, at

least 3,111 persons were drawn for service as grand and petit jurors in Beaufort County during the 64 weeks of court held in the five years next preceding the trial of this proceeding.

The petitioner undertook to have Marslender classify the 3,111 persons as to race by merely inspecting their bare names as they were recorded on minute dockets, which contained no indication of the race of any of them. Marslender stated that he did "not know too many colored people in Beaufort County personally," and that his mere perusal of the bare names on the minute dockets enabled him to identify only 28 of the 3,111 persons in question as Negroes. He testified further, however, that he did "not mean to testify" these 28 persons comprised "all the Negroes on these panels';' that he was able to classify only 815 of the 3,111 persons in question as members of the white race; and that he was totally unable to testify as to the racial identities of the remaining 2,268 persons whose names appeared on the minute dockets. These things being true, the intimation that only 28 Negroes were called for jury service in Beaufort County during the five years prior to the hearing in this proceeding finds no support in Marslender's evidence. Indeed, such intimation flies in the face of Marslender's positive statements: "I know there have been but a very few terms of court when there haven't been colored people on the grand jury, or the petit jury, or both." The 36 members of the regular panel and the 27 special veniremen mentioned in paragraphs 16 and 22 of the statement of facts are included in the 815 persons classified by Marslender as members of the white race. We close these incidental observations by noting that Lonnie Dennis, the only Negro witness, testified he did not know any Negroes qualified to serve on a jury who had been excluded from so doing by officials of Beaufort County.

Apart from the North Carolina Post-Conviction Hearing Act, the law bearing on the questions arsing on this review is well settled. It is set forth in the numbered paragraphs which follow:

1. A state denies to a Negro citizen charged with crime the equal protection of the laws contrary to the Fourteenth Amendment to the United States Constitution whenever its legislators, or its courts, or its administrative officers intentionally exclude Negro citizens from service upon the grand jury that indicts him or the petit jury which tries him solely because of their race or color. *Shepherd v. Florida,* 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740; *Moore v. New York,* 333 U.S. 565, 68 S. Ct. 705, 92 L. Ed. 881; *Brunson v. North Carolina,* 332 U.S. 851, 68 S. Ct. 634, 92 L. Ed. 1132; *Patton v. Mississippi,* 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76, 1 A.L.R. 2d 1286; *Hill v. Texas,* 316 U.S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559; *Smith v. Texas,* 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84; *Pierre v. Louisiana,* 306 U.S. 354, 59 S. Ct. 536, 83 L. Ed. 757; *Hale v. Kentucky,* 303 U.S. 613, 58 S. Ct. 753, 82 L. Ed. 1050 *Hollins v. Oklahoma,* 295 U.S. 394, 55 S. Ct. 784, 79 L. Ed. 1500; *Norris v. Alabama,* 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074; *Rogers v. Alabama,* 192 U.S. 226, 24 S. Ct. 257, 48 L. Ed. 417; *Neal v. Delaware,* 103 U.S. 370, 26 L. Ed. 567; *Ex Parte Virginia,* 100 U.S. 339, 25 L. Ed. 676; *Strauder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664; *S. v. Peoples,* 131 N.C. 784, 42 S.E. 814. A similar conclusion is reached in North Carolina under the law of the land clause embodied in Article I, Section 17, of the State Constitution. *S. v. Speller,* 229 N.C. 537, 47 S.E. 2d 537.

2. The Fourteenth Amendment to the Constitution of the United States does not confer upon a Negro citizen charged with crime in a state court the right to demand that the grand or petit jury, which considers his case, shall be composed, either in whole or in part, of citizens of his own race. All he can demand is that he be indicted or tried by a jury from which Negroes have not been intentionally excluded because of their race or color. In consequence, there is no constitutional warrant for the proposition that a jury which indicts or tries a Negro must be composed of persons of each race in proportion to their respective numbers as citizens of the political unit from which the jury is summoned. *Cassell v. Texas,* 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839; *Martin v.*

Texas, 200 U.S. 316, 26 S. Ct. 338, 50 L. Ed. 497; *Carter v. Texas,* 177 U.S. 442, 20 S. Ct. 687, 44 L. Ed. 839; *Gibson v. Mississippi,* 162 U.S. 565, 16 S. Ct. 904, 40 L. Ed. 1075; *Shibuya Jugiro v. Brush,* 140 U.S. 291, 11 S. Ct. 770, 35 L. Ed. 510; *Bush v. Kentucky,* 107 U.S. 110, 1 S. Ct. 625, 27 L. Ed. 354; *Virginia v. Rives,* 100 U.S. 313, 25 L. Ed. 667; *S. v. Brown, supra; S. v. Speller,* 231 N.C. 549, 57 S.E. 2d 759, and 230 N.C. 345, 53 S.E. 2d 294; *S. v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77; *S. v. Sloan,* 97 N.C. 499, 2 S.E. 666.

3. A state may prescribe such relevant qualifications as it deems proper for jurors without offending the Fourteenth Amendment to the United States Constitution as long as it takes care that no discrimination in respect to jury service is made against any class of citizens solely because of their race. Hence, a state statute may restrict eligibility for jury service in a county to adult citizens and residents who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries, and confer upon county commissioners the discretionary power to select for jury service in the county without regard to their race or color those adult citizens and residents who in their judgment possess these qualifications. *Fay v. New York,* 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043; *Franklin v. South Carolina,* 218 U.S. 161, 30 S. Ct. 640, 54 L. Ed. 980; *Williams v. Mississippi,* 170 U.S. 213, 18 S. Ct. 583, 42 L. Ed. 1012; *Murray v. Louisiana,* 163 U.S. 101, 16 S. Ct. 990, 41 L. Ed. 87; *Gibson v. Mississippi, supra; Shibuya Jugiro v. Brush, supra; Wood v. Brush,* 140 U.S. 278, 11 S. Ct. 738, 35 L. Ed. 505. The North Carolina statute does not contravene the Fourteenth Amendment. It prescribes relevant qualifications for jurymen, and does not discriminate against any person because of race or color. G.S. 9-1.

4. A Negro objecting to a grand or petit jury because of alleged discrimination against Negroes in it selection must affirmatively prove that qualified Negroes were intentionally excluded from the jury because of their race or color. *Fay v. New York, supra; Akins v. Texas,* 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692; *Martin v. Texas, supra; Brownfield v. South Carolina,* 189 U.S. 426, 23 S. Ct. 513, 47 L. Ed. 882; *Tarrance*

v. Florida, 188 U.S. 23 S. Ct. 402, 47 L. Ed. 572; *Williams v. Mississippi, supra; Smith v. Mississippi,* 162 U.S. 597, 16 S. Ct. 597, 16 S. Ct. 900, 40 L. Ed. 1082.

5. The Fourteenth Amendment to the United States Constitution requires a state to extend to a Negro charged with crime in its courts a fair opportunity to have it determined by adequate and timely procedure whether Negroes legally qualified to serve as jurors have been intentionally excluded on account of their race or color from the grand jury returning an indictment against him or from the lists of those drawn or summoned to serve as petit jurors on his trial. *Rogers v. Alabama, supra; Carter v. Texas, supra.* North Carolina criminal procedure, which is set forth below in numbered paragraphs 7 and 8, grants to a Negro defendant a fair and full opportunity to assert and establish an objection of this nature at the trial of the original criminal action against him, and thus satisfies this requirement of the Fourteenth Amendment. *Carter v. Texas, supra.*

6. The accused in a criminal action may waive a constitutional right relating to a mere matter of practice or procedure. *S. v. Hartsfield,* 188 N.C. 357, 124 S.E. 629; *Jennings v Illinois,* 342 U.S. 104, 72 S. Ct. 123, 96 L. Ed. 119; *Yakus v. United States,* 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834; *Parker v. United States,* 184 F. 2d 488; *People v. Harris,* 302 Ill. 590, 135 N.E. 75; 16 C.J.S., Constitutional Law, section 91; 23 C.J.S., Criminal Law, section 91. Hence, the constitutional right of a Negro defendent to be indicted or tried by a jury from which members of his race have not been intentionally excluded may be waived by him. *S. v. Kirksey, supra; Washington v. State,* 95 Fla. 289, 116 So. 470; *Merriweather v. Commonwealth,* 118 Ky. 870, 82 S.W. 592, 4 Ann. Cas. 1039; *Haggard v. Commonwealth,* 79 Ky. 366; *Keith v. State,* 53 Ohio App. 58, 4 N.E. 2d 220; *Watts v. State,* 75 Eex. Crim. Rep. 330, 171 S.W. 202. It is inherent in the judicial process that courts must deal with litigants as though they were acting in the persons of their attorneys. For this reason, the law confers upon the attorney for the defense in a criminal case the power to take such steps in matters of practice and pro-

cedures as he deems appropriate to protect the interests of the accused, and decrees that the accused is bound by his action as to those matters. *Abney v. State,* 47 Ga. 40, 139 S.E. 539; *State v. Froah,* 220 Iowa 840, 263 N.W. 525; *State v. Dangelo,* 182 Iowa 1253, 166 N.W. 587; *Dewberry v. Commonwealth,* 241 Ky. 726, 44 S.W. 2d 1076; *Sayre v. Commonwealth,* 194 Ky. 338, 238 S.W. 737, 24 A.L.R. 1017; *Bonar v. Commonwealth,* 180 Ky. 338, 202 S.W. 676; *State v. Turlok,* 76 Mont. 549, 248 P. 169; *State v. Keller,* 57 N.D. 645, 223 N.W. 698, 64 A.L.R. 434; *Jacobs v. State,* 85 Tex. Crim. Rep. 505, 213 S.W. 628. It necessarily follows that the attorney for the defense in a criminal action may waive a constitutional right of his client relating to a matter of practice or procedure. *S. v. Hartsfield, supra; James v. Commonwealth,* 197 Ky. 338, 247 S.W. 943. The right of a Negro defendant to object to a grand or petit jury upon the ground of discrimination against members of his race in the selection of such jury is waived by failing to pursue the proper remedy. *S. v. Kirksey, supra.* See, also, in this connection the cases collected in the annotation in 52 A.L.R. 919. This statement of the Circuit Court of Appeals for the Eighth Circuit is pertinent: "Where parties, even in a criminal case, knowingly and deliberately adopt a course of procedure which at the time appears to be to their best interest, they cannot be permitted at a later time, after a decision has been rendered adverse to them, to obtain a retrial according to procedure which they have voluntarily discarded and waived. *Johnson v. Zerbst, supra,* Syl. 2, page 458, 58 S. Ct. page 1019. Full opportunity having been afforded the appellants to apply to have the jury panel quashed and to have Negroes summoned on a new jury panel, they could not deliberately withhold their application for such procedure and then be heard after conviction to assert on *habeas corpus that* their conviction was void. Such is not the function of the writ of *habeas corpus.* In the situation presented there was no denial of judicial remedy; therefore there was no denial of equal protection nor of due process of law. The decision of their counsel learned in the law, an attorney of judgment, experience and discretion, that their interests would not be furthered by filing the application, was binding

upon the appellants and no inference can be drawn in view of the testimony on the trial that there was even a mistake of judgment chargeable to the attorney." *Carruthers v. Reed,* 102 F. 2d 933, *certiorari* denied in 307 U.S. 643, 59 S. Ct. 1047, 83 L. Ed. 1523.

7. The North Carolina statute codified as G.S. 9-26 provides that "all exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by a motion to quash the indictment, and if not so taken, the same shall be deemed to be waived." Under the statute, a motion to quash an indictment against a Negro is the proper remedy in a criminal case where Negroes were intentionally excluded from the grand jury returning the indictment solely on the ground of race or color. *S. v. Peoples, supra; S. v. Haywood,* 94 N.C. 847. The statute and related common law practice unite to create these three rules: (1) An accused may make the motion to quash the indictment as a matter of right up to the time when he is arraigned and enters his plea; (2) the presiding judge has the discretionary power to permit the accused to make the motion to quash the indictment as a matter of grace after his plea is entered and until the petit jury is sworn and impaneled to try the case on its merits; and (3) the presiding judge has no power to entertain a motion to quash the indictment at all after the petit jury is sworn and impaneled to try the case on its merits. *S. v. Banner,* 149 N.C. 519, 63 S.E. 84; *S. v. Gardner,* 104 N.C. 739, 10 S.E. 146. A Negro defendant waives any objection to the grand jury which indicts him on the ground that Negroes were intentionally excluded from such grand jury because of their race or color unless he takes the objection by a motion to quash the indictment before entering a plea to the merits. *S. v. Banner, supra.* When a Negro defendant moves to quash an indictment on the racial exclusion theory either as a matter of right or a a matter of grace, he may offer evidence to sustain his motion.

8. The objection of a Negro charged with crime that qualified Negroes were excluded solely because of their race or color from the list of persons drawn or summoned to serve

as petit jurors at his trial must be taken by a challenge to the array or a motion to quash the panel or venire before entering upon the trial. *S. v. Parker,* 132 N.C. 1014, 43 S.E. 830. If not so taken ,the objection is waived. *S. v. Kirksey, supra.*

The evidence showed, and the presiding judge found, in essence, that Hallet S. Ward and James B. McMullan, the petitioner's court appointed attorneys in the original criminal action, were competent lawyers; that they determined after deliberate consideration not to challenge the grand jury that indicted the petitioner or the petit jury that tried him on the theory that members of his race, to wit, Negroes, were intentionally excluded from the jury on account of their race or color; that they knowingly and deliberately adopted this course of procedure because they deemed the racial exclusion theory to be without merit in fact, and because this course appeared to them at the time to be the best interest of the petitioner; and that in consequence of these things the petitioner pleaded not guilty to the indictment against him and went to trial on the merits in the original criminal action without making any objection to either the grand or the petit jury.

The presiding judge concluded as a matter of law on the basis of this evidence and these findings of fact that the petitioner, acting through his attorneys in the original criminal action, effectually waived for all time his constitutional right to object to the grand and petit juries which indicted and convicted him upon the ground that qualified Negroes were intentionally excluded from such juries solely because of their race or color by pleading not guilty and going to trial on the merits without making any objections to such juries. This legal conclusion, standing alone, is sufficient to sustain the judgment in this proceeding, if it be valid. It is too evident to admit of dispute that this legal conclusion finds full support in the principles of law enunciated in numbered paragraphs 6, 7, and 8 set forth above, and is sound unless those principles of law have been abrogated as to the petitioner by the North Carolina Post-Conviction Hearing Act. The petitioner insists that those legal principles are made inapplicable to him by

this statute because "there has been no prior adjudication" as to the constitutional rights he claims in this proceeding "by any court of competent jurisdiction."

The answer to the problem posed by this contention necessarily lies in the provisions of the Post-Conviction Hearing Act. In construing this somewhat novel statute, we observe a strict judicial decorum and refrain from expressing an opinion upon any matters beyond those necessary to a determination of the proceeding now before us.

The Post-Conviction Hearing Act provides in express terms that "any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work on the roads and highways of the State under the supervision of the State Highway and Public Works Commission, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court of competent jurisdiction," may apply by petition to the Superior Court for "an appropriate order with respect to the judgment or sentence in the former proceedings under which the petitioner was convicted." G.S. 15-217, 15-221.

The North Carolina Post-Conviction Hearing Act is modeled on the Illinois Post-Conviction Hearing Act, which is set forth in full in *People v. Dale*, 406 Ill. 238, 92 N.E. 2d 761. It is not designed to add to the law's delays by giving an accused two days in court where one is sufficient for the doing of substantial justice under fundamental law. It is not devised to confer upon an accused, who is defended by counsel of his own selection or competent counsel appointed by the court, a legal privilege, at his own election, to have his rights arising under the common law and the statutes adjudicated at a time of the State's choosing in the original criminal action, and his rights arising under the constitutions of his State and Nation adjudicated at a subsequent time of his own choosing in another proceeding. It is enacted to provide

an adequate and available post-trial remedy for persons imprisoned under judicial decrees who suffered substantial and unadjudicated deprivations of their constitutional rights in the original criminal actions resulting in their convictions because they were prevented from claiming such constitutional rights in the original criminal actions by factors beyond their control.

To this end, the North Carolina Post-Conviction Hearing Act establishes a new judicial proceeding by which the Superior Court may probe beneath the adjudication in the original criminal action in which an imprisoned petitioner was convicted and sentenced, and grant him appropriate relief in respect to his conviction and sentence in case it determines that two specified conditions concur. These conditions are as follows: (1) That there was a substantial denial of the constitutional rights of the petitioner in the original criminal action in which he was convicted and (2) that there has been no prior adjudication as to such constitutional rights by any court of competent jurisdiction.

When the instant proceeding is laid alongside the Post-Conviction Hearing Act as thus interpreted, it becomes plain that there was no *substantial denial* of the constitutional rights now claimed by the petitioner in the original criminal action which resulted in his conviction.

The petitioner was defended by competent counsel in the original criminal action. He was not prevented from laying claim to his alleged constitutional rights in that action by any factors beyond his control. On the contrary, he had a fair and full opportunity to assert his present claims in the original proceedings before a court, which was empowered by law to consider them and determine their validity. Acting through his counsel, he deliberately and knowingly refrained from presenting his present claims to the court for adjudication in that proceeding because he deemed them to be without merit in fact and believed their non-assertion to be to his best interest. A litigant does not suffer a *denial* of a supposed right when he intentionally and voluntarily relinquishes it.

It follows that the presiding judge rightly ruled that the petitioner waived the claims which he now undertakes to assert. This conclusion is in accord with decisions of the United States Supreme Court and the Supreme Court of Illinois in a proceeding under the Illinois Post-Conviction Hearing Act. *Jennings v. Illinois, supra; People v. Jennings,* 411 Ill. 21, 102 N.E. 2d 824.

The petitioner's plight would be the same even if he had not waived his claims. The evidence and the findings show that his constitutional rights were not violated in the proceeding culminating in his conviction.

The judicial order staying the execution of the judgment of death automatically expires on the day of the filing of this opinion. See: G.S. 15-194.

A criminal prosecution is likely to have a tragic ending for the accused if defense attorneys are compelled to make legal bricks without factual straw.

The judgment is

Affirmed.

Parker, J., took no part in the consideration or decision of this case.

Chapter 9, General Statutes of North Carolina:

§ 9-1. The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such persons

who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

§ 9-2. *Names on list put in box.* — The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term

of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-6. *Jurors having suits pending.* — If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

§ 9-7. *Disqualified persons drawn.* — If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

§ 9-8. *How drawing to continue.* — The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

§ 9-19. *Exemptions from jury duty.*—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of

either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard, North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-29. *Special venire to sheriff in capital cases.* — When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

§ 9-30. *Drawn from jury box in court by judge's order.*—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken.

Chapter 14, General Statutes of North Carolina:

§ 14-17. *Murder in the first and second degree defined; punishment.*—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the state's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the state's prison.